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In the Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL O'KEEFE, SR., ERIC SCHMIDT, JOHN O'BRIEN, GARY R. BENNETT, PAUL SCHMITZ,
PETITIONERS

VS.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review a decision by the Fifth Circuit which denies the petitioners their right to confrontation guaranteed by the Sixth Amendment, as a result of the Fifth Circuit's reliance upon untraversed affidavits submitted by the Government in support of its Motion for Reconsideration filed after the granting of a new trial?

The petitioners at the District Court level never had an opportunity to traverse affidavits submitted by the Government because the District Court denied the Government's Motion for Reconsideration. The Fifth Circuit did not remand the case for a hearing but merely accepted the affidavits despite the petitioners' outstanding request for an evidentiary hearing the Government's involvement in the confessed perjury by a key Government witness.

2. After a finding by both the district and appellate courts of (a) perjury by an indispensible key government witness and (b) knowledge of the falsehood by the Government, should the third element of a violation of this Court's ruling in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959) (ie., materiality) be decided by a "clearly erroneous" standard, instead of the *de novo* standard used by the Fifth Circuit Panel.

The Appellate Court Opinion did not give due deference to the District Court's finding of materiality and lack of corroboration as to the remaining evidence.

QUESTIONS PRESENTED continued

3. Should this Court grant certiorari to review a decision by the Fifth Circuit that a nullity (ie., a ruling by a district court after recusal) may be reviewed by an appellate court without a remand to the district court for decision on the merits?

A nullity cannot be "harmless error." The Fifth Circuit, after finding the District Court's ruling error, utilized the "harmless error" doctrine to establish appellate court jurisdiction. The entire matter should have been remanded for a hearing on the Government's Motion for Reconsideration.

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All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this Petition is as follows:

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PRAYER

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit dated November 11, 1997 and the denial of a Petition for rehearing and Suggestion for Rehearing *En Banc* on December 15, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix "A" to the Petition and is reported at 128 F.3d 885. Excerpts from the unpublished Opinion of Chief Judge Morey L. Sear of the United States District Court for the Eastern District of Louisiana granting the petitioners a new trial appear at Appendix "C" to the Petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit reversed and remanded the *O'Keefe* case was November 11, 1997. A timely Petition for Rehearing was denied by the United States Court of Appeals for the Fifth Circuit on December 15, 1997, and a copy of the Order denying rehearing and rehearing *en banc* appear at Appendix "B." The mandate was issued on December 23, 1997 and appears at Appendix "D."

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI of the United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

(a) Procedural Statement of the Case.

The petitioners were originally indicted on March 30, 1995. A first superseding indictment was returned on July 18, 1995 and a second superseding indictment was returned on February 2, 1996. Trial occurred from March 4, 1996 through March 21, 1996. The verdict was rendered on March 21, 1996. Post Trial motions were argued on July 31, 1996 with the Court granting the petitioners' Motion for New Trial on August 15, 1996.

Thereafter, the Government filed a Motin for Reconsideration on September 16, 1996. The petitioners were never given an opportunity to respond to this motion. That motion was denied on October 2, 1996, one day after a status conference was held with all the parties. A timely Notice of

Appeal was filed by the United States on October 31, 1996. Thereafter, the Fifth Circuit ruled on November 11, 1997.

Petitioners filed a Suggestion for Rehearing *En Banc* and a Petition for Rehearing on November 25, 1997, which were denied by the Appellate Court on December 15, 1997.

(b) Statement of Facts Necessary to the Argument of Issues.

The petitioners, Michael O'Keefe, Sr., Eric Schmidt, John O'Brien, Gary R. Bennett and Paul Schmitz, were indicted in the Eastern District of Louisiana on charges including conspiracy, wire fraud, mail fraud and money laundering. The petitioners operated a management group of Physicians National Risk Retention Group (PNRRG) which negotiated a contract of reinsurance with the State of Louisiana to take certain assets in exchange for certain liabilities in the future after the state placed PNRRG in receivership. The petitioners arranged to have Builders & Contractors Insurance (BCI), a Bahamian corporation whose managing director was Charles Donaldson, to act as a reinsurer. Subsequently, BCI denied knowledge of the contract. The focal point of controversy between the Government and the defense was whether the petitioners were aware of Donaldson's lack of authority or were merely using the company to obtain profits. The primary Government witnesses in the case were Donaldson and Johnny Moore, an attorney who represented the Louisiana Department of Insurance in the PNRRG receivership.

During his initial conference with the prosecution to negotiate a plea, Donaldson alleged, among other things, that O'Keefe had suggested that the corporate minutes of BCI be

altered to make it appear that Donaldson had BCI's authority. At his guilty plea, Donaldson adopted this allegation against O'Keefe.

To the contrary, the petitioners took the position that Donaldson had lied about his authority to **them** *and* the Government investigators, and that Donaldson had falsely accused O'Keefe of the alteration of minutes.

During the trial, Chief Judge Morey L. Sear ordered the production of Donaldson's FBI Form 302 Report of Interview. During cross examination, Donaldson finally admitted that he indeed falsely accused O'Keefe. (Cross examination of Donaldson, 3/12/96 - pp. 105-107) Incredibly, the Government, at trial, denied that Donaldson had ever made such an allegation. On redirect of Donaldson and during closing argument, the Government sought to bolster the credibility of Donaldson. (Transcript, Vol. 7, pp. 60-68, Vol. 12, pp. 20-22)

Despite Donaldson's perjury, the jury nevertheless convicted O'Keefe and his co-defendants. The defense filed various post-trial motions including a Motion for Evidentiary hearing attempting to obtain rough notes of the investigative interviews of Donaldson and Moore. (See Appendix "E") The Government opposed the motion, and Judge Sear denied an evidentiary hearing because his observations at trial were sufficient to **grant** a new trial.

The new trial was based upon (1) a key witness' admitted perjury, (2) the Government's knowledge of that perjury, (3) the Government's failure to comply with the discovery mandate of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963) and *Giglio v. U.S.,* 405 U.S. 150, 92 S.Ct. 763 (1972),

(4) suspicious changes in testimony by the other key Government witness, Moore, and (5) the Government's misleading of the defendants.

In the Order granting a new trial, Chief Judge Sear recused himself from further involvement because of his finding regarding the prosecution's misconduct. The case was thereafter reassigned to Judge Lemmon and the Government filed a Motion for Reconsideration attaching numerous newly minted affidavits from prosecutors, investigators and Donaldson's attorney. There was no affidavit from Donaldson. Judge Lemmon transferred the case back to Chief Judge Sear, who denied the Government's Motion for Reconsideration without a hearing, briefing, written reasons or even a formal opposition pleading from petitioners.

The Appellate Court found that Chief Judge Sear's denial of Reconsideration after recusal was error, but was harmless. Although judicial economy is cited as a reason, portions of the case were still remanded.[1]

The petitioners are seeking certiorari on issues relative to the recusal, the Appellate Court's reliance on untraversed affidavits, and the Appellate Court's reversal of the new trial order based on a finding of immateriality of the key witness' perjury and of the govenment's knowledge of that perjury.

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[1] The remaining post-trial arguments of the defendants, a request for evidentiary hearing and a subsequent Motion for New Trial are pending before Judge Lemmon with an April 1, 1998 hearing date.

REASONS FOR GRANTING WRIT

1) The Denial of the Appellee's Constitutional Rights to Confrontation and Due Process.

The Appellate Opinion relied in part on "the affidavits of both government attorneys and other members of the prosecutorial team that the government attached to its motion for reconsideration ..." *U.S. v. O'Keefe*, 128 F.3d 885, 897 (5th Cir. 1997). Petitioners respectfully submit that the reliance upon said affidavits deprives them of their Constitutional rights to due process and confrontation. Once the Motion for Reconsideration was filed and referred back to Chief Judge Sear, he held a status conference and, at its conclusion, set out a briefing schedule on the recusal issue. It was anticipated by everyone that eventually an evidentiary hearing would be held[2] and that petitioners could respond to the motion. The next day, Chief Judge Sear summarily denied the Government's Motion for reconsideration, thus effectively precluding petitioners' need to respond and to have an evidentiary hearing to traverse the affidavits of the prosecutors, agents and counsel for Donaldson. (See Appendix "F")

The prejudice suffered by the petitioners resulting from the Fifth Circuit's outright reliance on the uncontroverted affidavits is demonstrated by its acceptance of the Government's "story" of the "inaccurate 302." The Panel stated as follows:

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[2] The petitioners had requested an evidentiary hearing (in their post-trial motions), which was opposed by the Government. Subsequent to the adverse ruling by Chief Judge Sear, the Government then requested an evidentiary hearing.

> During pre-trial preparation, a Federal Bureau of Investigation ("FBI") 302 report was prepared from the notes of FBI Special Agent Phillips .... According to the transcribed FBI 302 report of this interview, **someone** stated that "O'Keefe suggested that BCI's shareholders meeting minutes be altered to make it appear that Donaldson had authority to enter into the PNRRG/BCI contract". (the "minutes"). **It is unclear who made this statement,** but when Donaldson later pled guilty in the U. S. District Court for the Middle District of Louisiana to one count of mail fraud in exchange for his testimony in this case, the prosecutors incorporated this statement into the factual basis of the guilty plea in such a way as to **make it appear** that Donaldson made the statement. *O'Keefe,* at 888. (Emphasis added)

In accepting these facts, the Panel relied on the post-trial affidavits even though Donaldson, **at the trial,** admitted that he had falsely accused O'Keefe. It is respectfully submitted that those affidavits are, at best, incomplete and, if not subject to traversal, should *not* have been considered by the Appellate Court.

Two of the inconsistencies are as follows: (1) Who stated that "O'Keefe suggested that BCI shareholders meeting minutes be altered to make it appear that Donaldson had our authority to enter into the PNRRG/BCI contract", Donaldson or his counsel, whose affidavit does **not** answer

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[3] These notes were not made available to the defense until the Government felt they were of value after an adverse ruling granting a new trial.

that question; and (2) When were the minutes altered? A deciphering of notes[3] of Special FBI Agent Phillips reflects:

> The longer affidavit[4] was prepared by Michael O'Keefe's office - and faxed to Charles Donaldson for signature. **O'Keefe told Donaldson he had to have perm [permission] in meeting minutes - that's when altered minutes.** (Emphasis Added) (Appendix "G")

This statement by Donaldson is false by his own later admission. The corporate minutes were altered at least by August of 1993. the affidavits that Donaldson alleges O'Keefe forwarded to him for execution were done in April, 1994.[5] The petitioners were unable to cross examine Donaldson on this inconsistency in his statement to the FBI because it did *not* appear in the typed version of the 302 produced during trial.

The Appellate Court, in effect, has accepted the denial of those accused of prosecutorial misconduct without any inquiry into the veracity of their statements.[6] Through those

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[3] These notes were not made available to the defense until the Government felt they were of value after an adverse ruling granting a new trial.

[4] The affidavit referred to in this paragraph is an affidavit signed by Donaldson in connection with an ongoing civil case dealing with Physicians National during the pre-indictment stage. Donaldson never submitted any post-trial affidavits.

[5] It is the April, 1994 affidavit process which was deleted from the Superseding Indictment. Chief Judge Sear found that this was done to mislead the defense (See Appendix "C")

[6] The excerpt of Chief Judge Sear's ruling (Exhibit "C") established the lack of candor of the Government with the District Court. How then can the Panel accept untraversed affidavits of the prosecutors as truthful without cross-examination?

post-trial affidavits, the Government has stated its "theory" of what transpired: Donaldson became befuddled under "devastating" cross examination and answered questions falsely to the benefit of the petitioners. Nowhere is there a post-trial affidavit of Donaldson. Is it not he who should come before the courts and address what the truth is? Is it not he who should explain to the courts which statement constitutes perjury and which is truthful?

The petitioners suggest an alternative theory that may be established if an evidentiary heaing is granted: (1) On February 28, 1995, Mr. Rosen, counsel for Donaldson, appeared at the United States Attorney's Office for the Eastern District of Louisiana for consultation concerning the investigation of Donaldson.[7] (2) The Government informed Rosen that it had a case of falsification of documents in the Bahamas against Donaldson. (3) Rosen then conferred with his client, Donaldson, and advised him to cooperate. (4) Donaldson then told his attorney and they in turn advised the Government that O'Keefe was "instrumental in getting Charles Donaldson to alter minutes" (Phillips notes at 2). (5) During trial preparation, after the Government became aware that Donaldson had falsely accused O'Keefe, the Indictment was changed and a letter was sent advising the defendants that Donaldson had altered the minutes alone. (6) Donaldson adopts the factual basis that included the false allegation against O'Keefe. (7) Then, at trial, Donaldson, after initially lying, admits that he falsely accused O'Keefe, and the Government begins its frantic cover-up of its knowledge that its key witness was a perjurer. At

[7] This is contrary to Rosen's sworn affidavit that he *first* met with the Government on March 3, 1995. One of the defense counsel drove him to a February 28, 1995 meeting.

an evidentiary hearing, the petitioners will, for the first time, be able to explore the circumstances surrounding Donaldson's perjuries. For example, attached hereto as Appendix "G" is a copy of an internal Government memorandum, received in discovery, which sets out the Government's knowledge of a "false documents case" in the Bahamas.[8]

This Court has long recognized that the right of confrontation is intended to prevent "conviction by affidavit." *Mattox v. United States,* 156 U.S. 237, 242 (1895). It requires cross examination, "the 'greatest legal engine ever invented for the discovery of the truth.'" *Maryland v. Craig,* 497 U.S. 836, 846 (1990). Here, the truth is still in doubt and cannot be decided by self-serving Government affidavits attempting to explain Donaldson's trial testimony. An evidentiary hearing is necessary, especially when both the trial and appellate courts find the prosecution explanation "unsatisfying." *O'Keefe,* at 896. The Fifth Circuit's denial[9] of an evidentiary hearing is contrary to the Eleventh Circuit's position that evidentiary hearings **should** be conducted. *U.S. v. Espinosa-Hernandez,* 918 F.2d 911, 913 (11th Cir. 1990).

The right and opportunity to cross-examine an adverse witness is guaranteed by the Sixth Amendment. *United States v. Townsend,* 31 F.3d 262, 268 (5th Cir. 1994), citing

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[8] This document contains handwritten notes between the trial prosecutors proving that the falsification of records was not a collateral issue raised by the defense at trial; rather, it was the very pressure point the Government used against Donaldson which lead to the false allegation against O'Keefe.

[9] The petitoners are urging the District Court to take the position that the issue of an evidentiary hearing is a remaining argument on remand from the Fifth Circuit opinion precludes an evidentiary hearing. Thus, the need for the petitioners to preserve this issue. This Court could direct that the District Court consider this motion for an evidentiary hearing.

Delaware v. Van Arsdall,, 475 U.S. 673, 678-79, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674. the primary purpose of the confrontation clause is to prevent trial by *ex parte* affidavits. *Mattox v. United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). This rationale applies equally when affidavits are admitted on motions for new trial *without* an evidentiary hearing. *See United States v. Culver,* 17 F.3d 349 (11th Cir. 1994) (Trial court abused its discretion in denying Government's motion for evidentiary hearing with respect to defendant's motion for new trial based upon affidavit, wherein witness recanted trial testimony); *United States v. Gates,* 10 F.3d 765 (11th Cir. 1993) (Defendant was entitled to evidentiary hearing on motion for new trial based on affidavit of convicted co-defendant).

State courts have also recognized that the right to confrontation is violated when testimony is admitted against a defendant by an untraversed affidavit. *See Adams v. State of Georgia,* 459 S.E.2d 182 (Ga. Ct. App. 1995) ("Affidavits of absent witnesses cannot be admitted in evidence at criminal trials because doing so violates the right of defendants to confront witnesses against them."); *Meza v. State of Texas,* 895 S.W.2d 399 (Tx. Ct. App. 1994) (The importance of the new-trial hearing justifies the full panoply of adversary safeguards, i.e., counsel, confrontation, cross-examination, and compulsory process for witnesses; where defendant was not provided an opportunity to cross-examine a witness whose affidavit was admitted by the State in opposition to motion for new trial, the defendant's confrontation rights were violated).

An evidentiary hearing on a motion for new trial is necessary where, as in the instant case, it is discovered **after trial** that a government informant or witness has committed perjury. *See United States v. Espinosa-Hernandez, supra,*

at 913 (District court erred in denying defendant's motion for new trial without an evidentiary hearing on government agent's misconduct; evidence that government agent committed perjury at defendant's trial goes beyond mere impeachment evidence, a new trial is necessary to "remove the taint" from defendant's conviction).

II) After a Finding by Both the District and Appellate Courts of (a) Perjury by an Indispensable Key Government Witness and (b) Knowledge of the Falsehood by the Government, the Third Element of a *Napue* Violation (ie., Materiality) Should be Decided by a "Clearly Erroneous" Standard, Instead of the De Novo Standard Used by the Fifth Circuit Panel.

In granting a new trial based on *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173 (1959), a Court should consider whether the (1) statements in question are shown to actually be false, (2) the prosecution knew they were false and (3) the statement was material. With regard to the first element, the prosecution has changed its position from an admission of perjury before Chief Judge Sear to a "revisionist history" position that "Donaldson didn't lie." Both the District Court and Appellate Court rejected this position by the Government. However, the Appellate Court took the position that the perjury was not "material."

With regard to the second element, both the District Court and the Appellate Court found that the prosecution knew of the falsehood. The Fifth Circuit Opinion states "we

do not disagree with the trial court's conclusion that the government was aware of Donaldson's falsehoods prior to trial based upon inconsistent answers of two government prosecutors as to when they were aware that Donaldson had testified falsely." *O'Keefe,* at 897, Fn. 11. Given the clear findings by the District and Appellate Courts of two elements of a *Napue* violation, the issue of materiality becomes the focus.

(a) **The Perjury was Material.**

While the Fifth Circuit Opinion notes that cross-examination was devastating to Donaldson's credibility, and therefore not "material", this is not the case. The nature of Donaldson's lie is not merely a falsehood in connection with a collateral element in the case. To the contrary, it demonstrates that a witness who is under pressure from the Government will falsely accuse another of a crime, and become the key witness to offer critical but nonetheless untruthful testimony.

Donaldson's lie is material. Under immense pressure placed upon him by the Government, Donaldson lies at a critical point in his plea bargaining. Donaldson immediately attributes his own actions to one of the petitioners (O'Keefe).

The issue of materiality should focus on how the fact-finding was distorted. While the Government tried on numerous occasions to explain away Donaldson's inconsistencies in chambers, Chief Judge Sear correctly noted "the jury was not in my chambers." Even the Appellate Court stated: "we must agree with Chief Judge Sear that those explana-

tions are unsatisfying.' *O'Keefe,* at 896.

The Appellate Court finds no impact by the perjury because of lack of credibility of Donaldson. The prejudice to the petitioners is they were deprived of the ability to show the jury how the prosecutors molded the testimony of Donaldson,[10] a molding process used to mold the testimony of the other Government witness, Moore. At best, the defense was left with an intimation of involvement by the Government in the falsehood.

(b) The Proffered Corroborating Evidence is Insufficient to Disregard the False Testimony.

The proffered corroborating evidence is insufficient to disregard the false testimony. The District Court, who heard all of the evidence and the testimony elicited, rejected the Government's contention that corroborating evidence was sufficient to disregard the false testimony. The Court "rejected the government's argument that the presence of other evidence against the defendants necessarily turned a tainted trial into a fair one." (Appendix "C" - page 80 of Chief Judge Sear's Opinion.)

Donaldson was the **only** witness from whose testimony

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[10] In post-trial motions, the prosecution highlighted the defense arguments that Donaldson had lied and "fooled the government." The defense was not able to argue that Donaldson *and the Government* attempted to fool the jury. Counsel did not at that time have a factual basis to argue the involvement of the Government. The Government involvement has never been explored and should be explored by an evidentiary hearing as requested by the petitioners.

it could be inferred that the petitioners knew that BCI had not granted him authority. The petitioners contended that Donaldson defrauded them as well as BCI. For the jury to convict, it had to believe that the petitioners were aware of the lack of authority, and Donaldson's testimony is the only link.

(c) The Fifth Circuit made a De Novo Finding of Immateriality and did not Use a Clearly Erroneous Finding to Disregard the District Court's Contrary Conclusion.

The Fifth Circuit panel made a finding that the perjury was immaterial and, therefore, did not agree that a *Napue* violation occurred. To the contrary, the District Court, who heard all of the evidence and presided over the elicitation of the perjurious testimony, found such perjury material to the convictions of these men. The Fifth Circuit Opinion should have used a clearly erroneous standard of review and not a *de novo* approach to the finding of materiality.

In recent Supreme Court cases with regard to the issue of materiality, this Court has found that materiality is a jury question. *U. S. v. Gaudin,* 115 S.Ct. 2310 (1995); *Johnson v. U. S.,* 117 S.Ct. 1544 (1997). While both the jury and the District Court judge heard the testimony, only the District Court heard the Government's explanation of Donaldson's perjured testimony. Certainly, the District Court, rather than the Appellate Court, would be in a better position to determine materiality. Thus, the *de novo* standard of review should be rejected by this Court.

III) If the Recused District Court Decision on Reconsideration is a Nullity, Remand is Required.

The Appellate court found that once Chief Judge Sear recused himself, he could not rule on the Motion for Reconsideration. 28 U.S.C. §455. The Panel further noted that

> "Our decision today, aids rather than prejudices justice in other cases because it clarifies *an unclear area of the law and serves as a caution to district court judges* of the importance of taking no discretionary action after recusal." *O'Keefe,* at 893

However, the Fifth Circuit Opinion does not merely set aside Chief Judge Sear's denial of the reconsideration and remand the case to Judge Lemmon. Instead, the Panel takes the extraordinary step of deciding certain issues with regard to the allegation of Government misconduct and then still remands the case for further hearing of the "remaining arguments for new trial."

During oral argument, members of the Fifth Circuit Panel questioned their own jurisdiction based on the nullity of Judge Sear's order. If that order is null, then there is no final appealable ruling on the Government's motion, and the Appellate Court had no jurisdiction. Although the Panel used the "harmless error" doctrine to establish its jurisdiction, the appropriate relief when the Order is a nullity is a full remand to the District Court for a decision on the Govern-

ment's "Motion for Reconsideration. See, *El Fenix v. The M/Y Johanny,* 36 F.3d 136 (1st Cir. 1994), where the matter was remanded to a different judge, after the recused judge reconsidered his recusal. This would allow the District Court to decide on all issues presented by the petitioners before a review and/or intervention by the Appellate court.

CONCLUSION

The petiton for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff–Appellant,

v.

Michael O'KEEFE, Sr.; Eric Schmidt;
John O'Brien; Gary Bennett; Paul Schmitz,
Defendants-Appellees.

No. 96-31181.

United States Court of Appeals,
Fifth Circuit.

Nov. 11, 1997.

After jury convicted defendant of conspiracy, wire fraud, mail fraud, and money laundering, the United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., granted defendant's motion for new trial and, after recusing himself, denied government's motion for reconsideration. Government appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that: (1) appellate jurisdiction existed; (2) trial judge should not have ruled on motion to reconsider after he recused himself; (3) new trial on ground of presentation of false evidence was unwarranted; (4) prosecution did not violate *Brady;* and (5) case would be remanded to same district, rather than different district, for consideration of defendant's remaining arguments for new trial.

Vacated and remanded, government's motion denied.

Stephen A. Higginson, Asst. U.S. Atty., New Orleans, LA, for Plaintiff-Appellant.

Richard T. Simmons, Jr., William Glenn Burns, Hailey, McNamara, Hall, Larmann & Papale, Metairie, LA, for Michael O'Keefe, Sr., Defendant-Appellee.

John R. Martzell, New Orleans, LA, for Eric Schmidt, Defendant-Appellee.

Bruce Charles Ashley, New Orleans, LA, for John O'Brien and Gary Bennett, Defendant-Appellees.

James A. McPherson, New Orleans, LA, for Paul Schmitz, Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, JOLLY and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

The United States appeals the district court's order granting a new trial and its denial of the government's motions for reconsideration of its order granting a new trial and to enforce the recusal of Chief Judge Morey L. Sear following the convictions of Michael O'Keefe, Sr., Eric Schmidt, John O'Brien, Gary Bennett, and Paul Schmitz (collectively "O'Keefe"). We vacate the order granting a new trial and remand to the district court to consider O'Keefe's remaining arguments, as yet unaddressed, for new trial. We

deny the government's request to remand this case to a judge outside the Eastern District of Louisiana.

I.

We briefly outline the facts of this case insofar as they are relevant to this appeal, largely concerning procedural matters. O'Keefe operated the management company of Physicians National Risk Retention Group ("PNRRG"), a Louisiana medical malpractice insurer, and the other defendants were involved with the company in various capacities. When PNRRG became insolvent and the state of Louisiana moved to have it liquidated, the defendants arranged to have Builders and Contractors Insurance, Limited ("BCI"), a Bahamian corporation run by Charles Donaldson, act as a reinsurer. Various assets of PNRRG were taken out of PNRRG's estate to cover liabilities and claims that were transferred to BCI, and put in the trust account of O'Keefe's law firm on behalf of BCI. Ultimately, a large portion of these assets of PNRRG found their way into the personal bank accounts of the defendants through a complex scheme found by the jury to be fraudulent.

In a series of indictments listing differing factual bases whose relevance we shall discuss later, a grand jury charged O'Keefe and the other defendants with multiple crimes, including conspiracy, wire fraud, mail fraud and money laundering. The two main government witnesses were Donaldson and Johnny Moore, participants in the scheme. During pre-trial preparation, a Federal Bureau of Investigation ("FBI") 302 report[1] was prepared from the notes of

1 An FBI 302 report is a typed transaction of the notes of an FBI agent's interview with a witness, usually prepared for testimony of a witness who may be presented at trial.

FBI Special Agent Phillips based on a telephone interview between Donaldson, his attorney, government prosecutors, Phillips and other law enforcement personnel. According to the transcribed FBI 302 report of this interview, someone stated that "O'Keefe suggested that BCI's shareholders meeting minutes be altered to make it appear that Donaldson had authority to enter into the PNRRG/BCI contract" (the "minutes"). It is unclear who made this statement, but when Donaldson later pled guilty in the U.S. District Court for the Middle District of Louisiana to one count of mail fraud in exchange for his testimony in this case, the prosecutors incorporated this statement into the factual basis of the guilty plea in such a way as to make it appear that Donaldson made the statement.

During the trial against O'Keefe before Chief Judge Sear and immediately prior to Donaldson's direct testimony, the government provided a copy of the FBI 302 report to the defense, pursuant to the Jencks Act, 18 U.S.C. § 3500 *et. seq.* On direct questioning, the government did not ask any questions concerning the minutes, but when one of the defense attorneys questioned Donaldson about the minutes on cross-examination, Donaldson admitted to accusing O'Keefe falsely of participating in the alteration of the minutes.[2] In a

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[2] The following colloquy occurred between Simmons, the attorney for O'Keefe, and Donaldson, on cross-examination:

> Q: Did you tell anyone that Mr. O'Keefe had created those minutes of December '88 by the addition of the words "five years thereafter."
> A: I don't recall. I—I know that I admitted I said that I created—I put them in myself.
> Q: That's not my—my question. Let me rephase it.
> A: Did—did I tell anyone that he suggested that? I—I can't recall if I did.
> ***

sidebar conference that followed, the government denied that Donaldson had ever accused O'Keefe of helping to alter the minutes and stated that the FBI 302 report was mistaken if it attributed the statement to Donaldson, and explanation

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(footnote 2 continued)

Q: Since you've started cooperating with the Government, when you're supposed to be truthfully, have you ever told anyone that Mr. O'Keefe created those minutes of December 1988? And by create I mean adding the five years thereafter?
A: I don't think so. I may have.
Q: You may have?
A: Yes, I can't recall. Was that a clear answer? I can't recall.
Q: You're suggesting that you may have accused him of creating documents that you created?
A: I said I can't recall.
***
Q: Isn't it a fact, Mr. Donaldson, that you told the agent that Mr. O'Keefe suggested that the minutes be altered?
A: (No response)
Q: Didn't you tell the agents that?
A: No, I did not.
Q: Your testimony under oath is that on March 3, 1995, you did not tell Agent Susan Phillips that Mr. O'Keefe suggested that the BCI shareholders minutes be altered to make it appear that Donaldson had authority to enter into the contract, did you make that statement to the F.B.I.?
A: At—I—I did, yes.
Q: And that was a false statement, wasn't it sir?
A: It was a false statement.
Q: And you lied to the FBI, did you not?
A: Yes I did.

Based on this exchange, the court found that Donaldson uttered four possible falsehoods. First, in court on cross-examination, Donaldson falsely accused O'Keefe of participating in altering the minutes. Second, in his guilty plea, Donaldson agreed with the factual basis of the plea, which contained the statement falsely suggesting that O'Keefe participated in the alteration of the minutes. Third, if Donaldson did not previously falsely accuse O'Keefe of participating in the alteration of the minutes, then he uttered a falsehood when he admitted in court that he had accused O'Keefe of participating in the alteration of the minutes. Finally, the court found that Donaldson uttered a falsehood when he stated that the government did not know, prior to trial, that he had lied concerning altering the minutes.

that the court rejected. On redirect, the government half-heartedly attempted to bolster Donaldson's credibility. After Donaldson left the stand, defense counsel moved to strike the testimony of Donaldson, which the court refused to do. In closing arguments, the defense highlighted Donaldson's impeachment, and the court included a strong statement admonishing the jury to consider carefully the credibility of witnesses in its jury instructions. Despite Donaldson's testimony and impeachment, the jury convicted O'Keefe and his co-defendants.

After trial, the defense made various post-trial motions, including a motion for new trial. Chief Judge Sear conducted a hearing on the motions at which the parties presented legal arguments but no evidence. The court granted the new trial motion because it found that Donaldson falsely accused O'Keefe of participating in the alteration of the minutes, and that the government knew about the falsehood because the two prosecutors gave inconsistent answers as to whether they learned of the falsehood prior to trial. The court also found that the long, drawn-out pauses before Donaldson answered the defense counsel's questions in the colloquy set out above supported an inference that the government knew about Donaldson's false accusation prior to trial. Several other factors reinforced the court's finding that Donaldson's false testimony warranted a new trial. First, the court found that the government's release of the FBI 302 reports to the defense complied with the Jencks Act, but did not comply with the government's obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Second, another key government witness, Moore, often changed his testimony, which became significant in light of Donaldson's false testimony. Third, the court found that the prosecution had

redrafted the indictment in an attempt to mislead the defense by deleting counts connected to the minutes.

After granting the new trial, Chief Judge Sear disqualified himself from further involvement. This case was then assigned to Judge Mary Ann Vial Lemmon, and the government filed a motion for reconsideration of the order granting new trial ("motion for reconsideration"). Judge Lemmon transferred the case back to Chief Judge Sear, who denied both the government's motion to enforce recusal and the motion for reconsideration. This appeal timely followed.

II.

Prior to consideration of the merits, we resolve various challenges to our jurisdiction in this case. These jurisdictional challenges center on the government's notice of appeal, whether Chief Judge Sear appropriately ruled on the motion for reconsideration after his recusal, and if we find that Chief Judge Sear should not have ruled on the motion for reconsideration, whether we must remand to Judge Lemmon to decide the motion for reconsideration.

A

[1] O'Keefe argues that we have no jurisdiction to hear this appeal because the notice of appeal filed by the government fails to comport with the requirements of 18 U.S.C. § 3731, which governs interlocutory appeals by the government from orders granting new trial.[3] The government's notice

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[3] 18 U.S.C. § 3731 (1994) provides in relevant part:

In a criminal case an appeal by the United States shall lie to a court

of appeal specified the denial of the reconsideration of the order granting new trial and the order mooting all other motions filed by the government, including the government's motion to enforce recusal of Chief Judge Sear. O'Keefe argues that because the government appealed the denial of the reconsideration of the order granting new trial rather than the order granting new trial, § 3731 does not permit jurisdiction over this appeal.

We rejected a similar jurisdictional challenge in *United States v. Greenwood*, 974 F.2d 1449 (5th Cir. 1992). In response to the same type of argument raised by O'Keefe, the court stated that

> [a]lthough *in form* the Government's notice of appeal was from the district court's July 30 denial of the motion to reconsider, *in substance* the appeal is one from the district court's sentences imposed in the spring of 1991 . . . . [S]o long as a notice of appeal puts the other side on notice that the final judgment is the subject of the appeal, a technical defect in the notice of appeal is not fatal (citations omitted).

Greenwood, 974 F.2d at 1467 n. 13 (emphasis in original); *see also* 9 JAMES WM. MOORE ET AL., MOORE's FEDERAL PRACTICE ¶ 203.17[2], at 86-87 (2nd ed. 1996) ("[A]s long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is

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(footnote 3 continued)

> of appeals from a decision, judgment, or order of a district court... granting a new trial after verdict or judgment ... except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> *Id.*

not misled by the mistake," the jurisdiction of the appellate court is not barred by mistake in notice of appeal.).

[2] Here, we find that O'Keefe was put on notice by the government's notice of appeal and that he was not prejudiced by the misstatement in the notice of appeal. First, appeal of an order granting new trial can be fairly inferred from a notice appealing denial of reconsideration of that order because the connection between the two is clear and direct. *See Matute v. Procoast Nav. Ltd.*, 928 F.2d 627, 629 (3rd Cir. 1991) (finding link between an order of dismissal and an order denying motion for reconsideration of the order of dismissal to be clear and direct). Moreover, both the government and O'Keefe fully briefed the merits of this appeal, which would imply that O'Keefe was both on notice that the government intended to appeal the order granting new trial and that he was not prejudiced as a result of the misstatement in the government's notice of appeal. *See, e.g., Foman v. Davis*, 371 U.S. 178, 181-82, 83 S.Ct. 227, 229-30, 9 L.Ed.2d 222 (1962); *Kruso v. International Tel. & Tel.*, 872 F.2d 1416, 1423 (9th Cir. 1989). The order granting new trial and the motion for its reconsideration are also inextricably linked because we cannot analyze whether the district court abused its discretion in denying the motion for reconsideration without considering the merits of the order granting new trial. Thus, as the government's intent to appeal the order granting new trial can be fairly inferred from its noticing the district court's denial of reconsideration of that order, and as O'Keefe was not prejudiced by the misstatement, the mistake in the notice

of appeal does not bar our exercising jurisdiction in this case.[4]

B

The government argues that Judge Sear erred in failing to enforce his recusal and in denying the motion for reconsideration.[5] O'Keefe argues that Chief Judge Sear properly refused to enforce the recusal because, quite simply, Judge Lemmon could not reconsider what Judge Lemmon had not considered in the first place.

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[4] O'Keefe alternatively argues that noticing the motion for reconsideration without mentioning the order granting new trial resulted in the government waiving appeal on the issue of the order granting new trial. A notice of appeal "must designate the judgment, order, or part thereof appealed from." FED R. APP. P. 3(c). While a policy of liberal interpretation of notices of appeal is the rule when the intent to appeal an unmentioned or mislabeled ruling is clear and no prejudice will result to the opposing party, when only a specified judgment or part thereof is noticed, the notice of appeal is generally strictly construed. *See C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1055-56 (5th Cir. 1981). We found above that O'Keefe clearly had notice that the government intended to appeal from the order granting new trial when it appealed from the denial of the reconsideration of that order and that no prejudice would result to O'Keefe because the merits of this case were fully argued in the briefs he presented to this court. Accordingly, we hold that the government did not waive its appeal of the order granting new trial as a result of any defects in its notice of appeal.

[5] Chief Judge Sear stated that

> [b]ecause of the sensitive nature of the court's inquiry concerning conduct of government counsel, the court's personal participation and questioning of counsel in connection with that inquiry, and the findings of the court resulting from that inquiry, the court feels compelled to recuse itself from further handling of this matter in accordance with 28 U.S.C. §455.

United States v. O'Keefe, No. 96-31181, at 71 (E.D.La. Aug. 15, 1996)(order granting new trial)(hereinafter "Order").

[3,4] Once a judge recuses himself from a case, the judge may take no action other than the ministerial acts necessary to transfer the case to another judge, even when recusal is improvidently decided. *See Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 457 (5th Cir.1996) (holding that judge erred in vacating recusal order after recusing herself); *Moody v. Simmons*, 858 F.2d 137, 143 (3rd Cir. 1988) (stating that judge may only perform the "housekeeping" duties necessary to transfer a case to another judge after recusing himself from a proceeding). A ministerial act is usually defined as an act that is essentially clerical and does not involve the exercise of discretion or judgment. *See United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420, 51 S.Ct. 502, 504, 75 L.Ed. 1148 (1931) (describing a ministerial duty as one in which "the obligation to act [is] peremptory, and plainly defined"); *Moody*, 858 F.2d at 143 (holding that orders converting Chapter 11 bankruptcy to Chapter 7 bankruptcy, disqualifying counsel, vacating a contingent fee agreement, and making findings attacking counsel exceeded "housekeeping" orders). A district court necessarily has discretion as to whether to reopen a case in response to a motion for reconsideration. *See Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990). Thus, when Chief Judge Sear ruled on the motion for reconsideration, he performed a discretionary act, not a ministerial act.

[5, 6] O'Keefe (as Chief Judge Sear noted below) essentially argues that an exception from the bright-line rule for recusals described above should be created for motions for reconsideration because a judge cannot reconsider what that judge has not considered previously. Toward this end, O'Keefe cites *McRae v. United States*, 420 F.2d 1283 (D.C.Cir. 1969), for the proposition that a district court judge cannot reconsider matters previously decided by another district court judge, and that the proper method for resolution of this situa-

tion is appeal to a higher court. This argument ignores the many instances in which one district court judge must reconsider an order previously granted by another judge because of the first judge's death, illness, or disqualification. *See TCF Film Corp. v. Gourley,* 240 F.2d 711, 714 (3rd Cir. 1957). It also overlooks the law of the case doctrine, which emcompasses situations in which one judge has rendered an order or judgment and the case is then transferred to another judge. *See Abshire v. Seacoast Products,* 668 F.2d 832, 838 (5th Cir. 1982). Under the law of the case doctrine and general principles of comity, a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently. *See Loumar, Inc. v. Smith,* 698 F.2d 759, 762-63 (5th Cir. 1983) (stating that under the law of the case doctrine, a second court should follow a ruling made by an earlier court unless the prior decision was erroneous, is no longer sound, or would create injustice). Thus, even though Judge Lemmon did not consider the new trial motion initially, Judge Lemmon would have been able to consider the motion for reconsideration and, as such, Chief Judge Sear erred when he ruled on the motion for reconsideration.[6]

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[6] We recognize that our ruling today may put one district judge in the somewhat uncomfortable position of having to pass judgment on the discretionary rulings of another judge in the future. However, the values underlying 28 U.S.C. § 455, indluding "protecting the litigants' constitutional entitlement to an unbiased adjudication and the public's perception of the integrity of the judicial process" demand no less. *See Doddy,* 101 F.3d at 457. Judges have, moreover, under law of the case doctrine experience reviewing the discretionary rulings of other judges, and we are confident that they will be able to carry out any additional duties resulting from our ruling today. A contrary result, we believe, would mean that when a judge has to recuse himself, the parties lose the option of filing a motion for reconsideration, something that we are not inclined to find, both because of the impact on the parties and because reconsideration may obviate the need to appeal. *See Greenwood,* 974 F.2d at 1466. No such

C

[7, 8] The "harmless error" standard is used to determine whether orders that a judge issues after the judge has, or should have, recused himself must be vacated. *See Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 862, 108 S.Ct. 2194, 2203, 100 L.Ed.2d 855 (1988); *Doddy,* 101 F.3d at 458; *El Fenix de Puerto Rico v. The M/Y JOHANNY,* 36 F.3d 136, 142 (1st Cir. 1994) (concluding that "the need for finality and a common-sense aversion to frittering away scarce judicial resources militate against an inflexible rule invalidating all prior actions of a judge disqualified under § 455(a)"). Under the "harmless error" test, we examine: (1) the risk of injustice to the parties in this particular case, (2) the risk that denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process. *See Liljeberg,* 486 U.S. at 864, 108 S.Ct. at 2205; *Doddy, 101 F.3d at 458. As we explain below,* we conclude that it is unnecessary to vacate Chief Judge Sear's ruling and remand for Judge Lemmon to rule on the motion for reconsideration because Chief Judge Sear's ruling on the motion for reconsideration was harmless error.[7]

[9] Applying the three-part harmless error test, we first

(footnote 6 continued)
problem exists in this case, of course, as we vacate the order granting new trial and only remand for Judge Lemmon to hear O'Keefe's remaining arguments for new trial that Chief Judge Sear declined to decide after he granted a new trial based on the deprivation of due process.

[7] Another option is also available: we could hold the appeal in abeyance and remand the motion for reconsideration to Judge Lemmon for her to rule on the motion for reconsideration. In the event that Judge Lemmon vacated the order granting new trial, this appeal would then become moot. Although our decision in *Greenwood* could arguably be read to endorse such an approach, *see Greenwood,* 974 F.2d at 1469, as the record in this case is fully developed, very little would be gained by remanding and waiting for the district court's ruling on reconsideration rather than reviewing the order granting new trial ourselves now.

note that little risk of injustice to the parties will result from not vacating the denial of the motion for reconsideration and remanding for reconsideration by Judge Lemmon. The record is sufficient for us to review the order granting new trial. Our review of the order granting a new trial and the denial of the motion for reconsideration under an abuse of discretion standard, *United States v. Pankhurst,* 118 F.3d 345, 353 (5th Cir. 1997), is only slightly more deferential than a district court's review under the law of the case doctrine. *See Abshire,* 668 F.2d at 837 (holding that a successor judge should generally treat an order in a case transferred by another judge with deference). Moreover, were we to vacate Chief Judge Sear's order denying the motion for reconsideration, then the motion for reconsideration would still be pending, and we would have to remand for Judge Lemmon to rule on that motion. *See Southland Indus. v. Federal Communications Comm'n,* 99 F.2d 117 (D.C. Cir. 1938) (holding that a decision is not final until an application for reconsideration has been decided). Although the need for an appeal to this court might well be obviated by Judge Lemmon's decision, it is also possible that Judge Lemmon might deny the motion for reconsideration, which would then produce yet another appeal on the merits of the appeal now before us. Further, both the government and O'Keefe have fully discussed the merits of this case in their briefs, which when considered together with the other facts we adduced above, leads us to conclude that neither party would be prejudiced by our deciding the merits of this appeal without remanding to Judge Lemmon for a ruling on the motion for reconsideration.

[10] Second, our decision today aids, rather than prejudices justice in other cases because it clarifies an unclear area of the law and serves as a caution to district court judges of the importance of taking no discretionary actions after recusal.

It was not until 1984 that 18 U.S.C. § 3731 was amended to permit the government to appeal the interlocutory grant of a new trial. PUB.L. No. 98—473, § 1206, 98 Stat.1986 (1984) (codified at 18 U.S.C. § 3731). *Liljeberg,* which established the three-part harmless error standard for review of decisions made by a judge after recusal becomes appropriate, was not decided until 1988. *Liljeberg v. Health Serv. Acquisition Corp.,* 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). *Moody,* the first major case concluding that a judge could take no action after recusal other than to perform ministerial acts, was decided in the same year, and we only reached the same conclusion in December of 1996, after Chief Judge Sear had denied the reconsideration motion in this case. *Doddy v. Oxy, USA, Inc.,* 101 F.3d 488 (5th Cir. 1996); *Moody v. Simmons,* 858 F.2d 137 (3rd Cir. 1988). Thus, our decision today aids justice in other cases by alerting judges to the importance of taking no further discretionary actions after recusal.

Finally, there is little risk of undermining the public's confidence in the judicial process. While in some cases vacation of orders issued by a judge will restore public confidence in the legal system, *see United States v. Jordan,* 49 F.3d 152 (5th Cir. 1995), other courts have held that decisions that are based on technicalities and do not reach the merits of the case increase public distrust of the legal system. *See Parker v. Connors Steel Co.,* 855 F.2d 1510, 1527 (11th Cir. 1988). A pragmatic approach should be taken to the notion of harmless error so that when in doubt, a court can reach the merits of an appeal. *See, e.g., Brown Shoe Co. v. United States,* 370 U.S. 294, 306, 82 S.Ct. 1502, 1513, 8 L.Ed.2d 510 (1962) (stating that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the

'just, speedy, and inexpensive determination of every action' " (quoting FED.R..CIV.P. 1)). Accordingly, we hold that Chief Judge Sear's ruling on the motion for reconsideration after recusal was harmless error and does not have to be vacated. The result of this conslusion is that with all of the challenges to our jurisdiction cleared away, we now proceed to a resolution of this appeal on the merits.

III

[11] "[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.... The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959). A *Napue* violation may occur not only when the prosecuting attorney knows that a witness's testimony is false, but also when another government attorney knows of the false testimony and does nothing to correct it. *See Giglio v. United States,* 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). False testimony for these purposes includes testimony that affects only the credibility of a witness. *Napue,* 360 U.S. at 269-270, 79 S.Ct. at 1177. Thus, the grant of a new trial based upon a *Napue* violation is proper only if (1) the statements in question are shown to be actually false; (2) the prosecution knew that they were false; and (3) the statements were material. *United States v. Blackburn,* 9 F.3d 353, 357 (5th Cir. 1993). On appeal, the government argues that none of these three elements exists.

[12-15] We review an order granting new trial under an abuse of discretion standard. *United States v. Pankhurst,* 118 F.3d 345, 353 (5th Cir. 1997). This standard is necessarily deferential to the trial court because we have only read the record, and have not seen the impact of witnesses on the jury or observed the demeanor of the witnesses ourselves, as has the trial judge. *See United States v. Boyd,* 55 F.3d 239, 242 (7th Cir. 1995). Questions of law, however, are reviewed *de novo. Munn v. Algee,* 924 F.2d 568, 575 (5th Cir. 1991). On mixed questions of law and fact, we review the underlying facts on an abuse of discretion standard, but the conclusions to be drawn from those facts *de novo. Ornelas v. United States,* __U.S. __,__, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996). The *Napue* test—specifically the issue of materiality—is just such a mixed question of law and fact, and so we undertake an independant appellate analysis to determine whether the facts found by the trial court rise to the level of the applicable legal standard.[8]

[16, 17] The Supreme Court has recently defined materiality in terms of a "reasonable probability" of a different outcome. *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct.

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[8] As the Supreme Court noted in *Ornelas,* "[i]ndependant review is therefore necessary if appelate courts are to maintain control of, and to clarify the legal principles." *Id.* at ——, 116 S.Ct. at 1662. Thus, while perforce we agree with the Seventh Circuit's conclusion in *Boyd* that deference should be given to the district court's finding of facts, we would be remiss in our duty as an appellate court if we did not decide whether those facts satisfied the applicable legal standard. *See also Miller v. Fenton,* 474 U.S. 104, 114, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985) (When the "relevant legal principle can be given meaning only through its application to the particuoar circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force, and in so doing, strip a federal appellate court of its primary function as an expositor of law.").

1555, 1566, 131 L.Ed.2d 490 (1995). Such a reasonable probability results when nondisclosure places the case in a different light so as to undermine confidence in the verdict. *Id.* at 435, 115 S.Ct. at 1566. The relevant inquiry examines the challenged evidence collectively, not on an item-by-item basis. *Id.* at 436, 115 S.Ct. at 1566-67. "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record," *Yates v. Evatt,* 500 U.S. 391, 403, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991).

[18, 19] It is axiomatic that not every lie is material. Along with other circuits, we have limited material lies to those that occur as a part of the prosecution's case. *See Hudson v. Blackburn,* 601 F.2d 785, 789 (5th Cir.1979); *see also United States v. Aichele,* 941 F.2d 761, 766 (9th Cir. 1991) (applying same rule). The prosecution has a duty only to "refrain from knowingly presenting perjured testimony and from knowingly failing to disclose 'that testimony used to convict a defendant was false.' " *Aichele,* 941 F.2d at 766 (quoting *United States v. Endicott,* 869 F.2d 452, 455 (9th Cir. 1989). Thus, when the defense elicits the alleged perjury on cross-examination, no material falsehood has occurred because the government has not itself knowingly presented false testimony. *Id.* We have adopted this position because it is the duty of the jury to determine the credibility of the witnesses. *See Little v. Butler,* 848 F.2d 73, 76 (5th Cir. 1988) (stating that "prosecutors are seldom able to vouch for their [accomplice witnesses'] credibility" and that courts should instruct juries to carefully scrutinize the testimony of such witness). Materiality, stated another way, occurs when the falsehood results in "a corruption of the truth-seeking

function of the trial process." *United States v. Agurs,* 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976); *United States v. Meinster,* 619 F.2d 1041, 1042 (4th Cir. 1980) (holding that underlying purpose of *Napue* and *Giglio* is not to punish prosecutor for the misdeeds of a witness, but rather to ensure that jury is not misled by any falsehoods).

[20] Not all falsehoods are material partially because of our concern with preserving the adversarial system: it is the prerogative of defense counsel to plan his or her cross-examination strategy, and undue clarification or interruption by the prosecution might interfere with that strategy. *See Mills v. Scully,* 826 F.2d 1192, 1196 (2nd Cir. 1987). Thus, courts have been extremely reluctant to find a deprivation of due process when the prosecution has provided the defense with the necessary information and it can utilize the information, but decides, for tactial reasons, not to use such information. *See United States v. Bethley,* 973 F.2d 396, 399 (5th Cir. 1992) (rejecting claim of *Napue* violation when government provided defendant with witness's rap sheets and plea agreement in related case and defendant's counsel failed to ask question regarding witness's denial of past convictions). However, even when the defense is aware of the falsity of the testimony, a deprivation of due process may result when the information has been provided to the defense but the government reinforces the falsehood by capitalizing on it in its closing argument, *see United States v. Sanfilippo,* 564 F.2d 176, 178 (5th Cir. 1977), or the defense is unable to utilize the information, *see id.* at 178-79, or when the government thereafater asks misleading questions, *United States v. Barham,* 595 F.2d 231, 243 n. 17 (5th Cir. 1979). Thus, materiality is a method of maintaining the equal playing field between the prosecution and the defense necessary

to allow the jury to perform its truth-seeking function.

[21] The trial court concluded that although some of Donaldson's falsehoods were revealed to the jury, the "true nature and scope of Donaldson's perjury was never disclosed or corrected by the government, or revealed on cross-examination by the defendants." Order at 71. The nature and scope of these falsehoods went unrevealed because the government never stated until after trial why it amended the indictment against O'Keefe, why it permitted the cross-examination of Donaldson to go forward with the FBI 302 report that it knew to be incorrect, and why the two prosecutors gave inconsistent answers as to when they learned of the falsehoods. The long, drawn-out pauses before Donaldson answered the defense's questions during the critical cross-examination colloquy also supported the inference that Donaldson had previously told the government about his false accusation of O'Keefe. Further, the court found that the government improperly bolstered the credibility of Donaldson on re-direct and during its closing argument by eliciting testimony that even though O'Keefe had not participated in the alteration of the minutes, he had knowingly incorporated them into an affidavit presented to a Louisiana state court. Finally, the court concluded that the prosecution thought that the testimony concerning the minutes was material because it had changed the indictment in an attempt to cover up the falsehood and to mislead defense counsel. On appeal, the government argues that all of Donaldson's falsehoods were revealed to the jury, and that even if they were not, those falsehoods were not material to the jury's verdict because Donaldson's testimony was overwhelmingly corroborated by other evidence and witnesses.

We first believe that the trial court abused its discretion when it made the factual finding that the government changed the indictments in an attempt to mislead the defense. This factual finding was an abuse of discretion because whether or not the government attempted to mislead the defense, the defense had too much knowledge of the minutes to be misled. The record shows that defense counsel and the government conferred prior to trial regarding the indictment as a result of various pretrial motions made by the defense contesting the statement in an earlier version of the indictment charging that O'Keefe had knowingly included the false minutes in an affidavit he presented to a Louisiana state court. The order granting new trial itself notes that the defense took depositions concerning the minutes and strongly contested the charge in the indictment concerning O'Keefe's knowing incorporation of the minutes into the affidavit. The government sent the defense a letter conceding that Donaldson had altered the minutes by himself.[9] Therefore, this indictment change and the documents provided to the defense, when combined with the FBI 302 report, put defense counsel on notice of possible falsehoods or inconsistencies uttered in the past by Donaldson, even if the defense did not know the precise reason the indictment was charged. As a result, we hold that

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[9] Affidavits by both government prosecutors in this case and other members of the prosecutorical team state that the indictment was republished to narrow the issues in contention, not to mislead the defense. These affidavits are part of the record on appeal, FED.R.APP.P. 10(a), because they were included with the government's reconsideration motion. In light of Chief Judge Sear's specific refusal to find that the government attorneys either suborned perjury or committed misconduct, these affidavits are one piece of evidence to be considered in deciding whether the government attempted to mislead the defense by republishing the indictment.

the district court abused its discretion by finding that the prosecution altered the indictment in an attempt to mislead the defense because even if the prosecution made such an attempt, the defense had too much knowledge of the minutes to be misled.

With respect to the district court's legal conclusion of materiality, falsehoods, to the extent that any were uttered, occurred as a result of the defense's cross-examination, not from testimony elicited by the prosecution. Once those falsehoods emerged, the defense had total leeway in cross-examining Donaldson and used the information provided by the prosecution to powerful effect. *See United States v. Adebayo,* 985 F.2d 1333, 1341-42 (7th Cir.1993) (rejecting *Napue* claim when false testimony was elicited by defense counsel on cross-examination because the false testimony was not part of government's case, defense counsel had total leeway to cross-examine witness, and jury instructions included cautionary statement). A review of the cross-examination set out in the margin above gives little doubt that the defense ably exploited the FBI 302 report that the government provided to the defense prior to Donaldson's direct testimony and which provided the basis for the defense's devastating cross-examination of Donaldson. Even if it is contended that the government had a duty to correct any falsehoods made during the course of this cross-examination that were not corrected by the concessions that Donaldson himself made, any attempt by the prosecution to intercede during this cross-examination would have actually harmed the defense by depriving the jury of the full, dramatic effect. *See United States v. Brand,* 80 F.3d 560, 565-66(1st Cir.1996) (holding that government had no duty to correct false statement by key witness denying promise

of leniency in exchange for testimony because of clarifying admissions by witness in presence of jury). There were also contemporaneous attempts by the government to explain the inconsistencies in Donaldson's testimony during sidebar conferences, although we agree with Chief Judge Sear that those explanations were unsatisfying.

We find that the falsehoods were sufficiently exposed before the jury to enable the jury to weigh those falsehoods in its deliberations. Defense counsel moved, immediately after Donaldson left the stand, to have his entire testimony stricken from the record, but Chief Judge Sear refused, stating that Donaldson's credibility was for the jury to decide. Defense counsel then made impeachment of Donaldson the centerpiece of their closing arguments.[10] Chief Judge Sear also included a strong cautionary statement in the jury

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[10] The various defense counsel representing the various defendants made the following statements in the course of their closing arguments:

Attorney Ashley: It is inconceivable, as you sit there, ladies and gentlemen, that after Charles Donaldson lied to this litany of people, including a federal judge, a federal prosecutors, is it inconceivable that he lied to these folks?... No, it's not inconceivable at all.

Attorney Martzell: Mr. Donaldson. I made a little calculation of the legal experience of the people of this side of the bench. I have not included the Judge's years at the bar. Something over 200 years of legal experience sitting out here. I guaranty, none of us ever have in the past or will have the unique experience that we had here of having a man admit under oath that he falsely accused one of the Defendants and didn't tell the government about it. Attorney Simmons: And it's been suggested that he didn't lie before you. When you go back there and you can deliberate any way you want, but see if you've been mislead by Mr. Donaldson. What were your thoughts at the time direct testimony was over? Starting to sound credible? What were your thoughts after cross-examination? Incredible. You were mislead. You were mislead hand-in-hand with the Prosecution. The question is whether they may know about it, but you were mislead by at least Mr. Donaldson.

instructions. Thus, the jury knew that Donaldson had lied either when he stated that he had not previously accused O'Keefe of participating in the alteration of the minutes or when he stated that he had accused O'Keefe of participating in altering the minutes. The jury was also able to evaluate the long, drawn-out pauses before Donaldson answered the defense's questions. *See United States v. Grosz*, 76 F.3d 1318, 1328 (5th Cir. 1996) (stating that sufficient exploration and correction of a falsity by the defense may render the falsehood immaterial by negating reliance on the falsehood by the jury). Accordingly, we find that the disclosure to the jury of Donaldson's falsehoods coupled with the prosecution's disclosures to the defense prevented those falsehoods from being material because enough information was provided to the jury to enable them to adequately perform their fact-finding function and to maintain the level playing field between the prosecution and the defense.[11]

Defense counsel argued in their motion for new trial and before us that they would have proceeded differently,

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[11] This finding that the falsehoods were not material is not negated by the prosecutor's half-hearted attempt to bolster the credibility of Donaldson on redirect and in closing arguments. Any such bolstering as may have occurred does not rise to the level of bolstering in cases where we have reversed the denial of a new trial. *See Sanfilippo*, 564 F.2d at 178-79. Moreover, we do not disagree with the trial court's conclusion that the government was aware of Donaldson's falsehoods prior to trial based on the inconsistent answers of the two government prosecutors as to when they were aware that Donaldson had testified falsely. We think that even if the government had such knowledge prior to trial, Donaldson's falsehoods were not material as a matter of law because the falsehoods were fully explored before the jury. Finally, the significance of the long, drawn-out pauses before Donaldson answered O'Keefe's questions during the critical cross-examination colloquy is precisely the kind of issue that the jury can weigh, and should not be a basis for a deprivation of due process based on the government's; knowing use of false testimony.

that they would have attempted to impeach the government as well as Donaldson and would have discussed how the factual basis for the guilty plea was selected, had they known the full facts surrounding Donaldson's false testimony at the time. We agree on several counts. First, the defense repeatedly characterized Donaldson as being completely impeached during its closing arguments. Second, the testimony of Donaldson was overwhelmingly corroborated by other witnesses, and the falsehoods occurred on collateral matters. *See Kopycinski v. Scott,* 64 F.3d 223, 226 (5th Cir. 1995) (holding that when withheld evidence seriously impeaches key witness's testimony on an essential issue, corroborating evidence should be examined to determine materiality of alleged falsehood). Although it is immaterial whether the falsehood concerns an essential element of the government's case or only a collateral matter affecting credibility, *United States v. Barham,* 595 F.2d 231, 241 (5th Cir. 1979), given the degree of impeachment of Donaldson on the stand, any further impeachment of the type that the defense now desires would merely have been cumulative. *See Guam v. Palomo,* 35 F.3d 368, 372 (9th Cir. 1994) (finding an alleged falsehood non-material when "additional impeachment value gained would have served only to emphasize a fact already established on cross-examination"). Third, although the burden to correct false testimony is on the government, the defense may have waived impeachment of the government by not calling FBI Agent Phillips, the author of the notes on which the FBI 302 report was based and who was present in court at various times. *See Bethley,* 973 F.2d at 399. Finally, Chief Judge Sear indicated that he was prepared to deny the motion for new trial prior to argument on the motion, but the answers of government attorneys at that argument convinced him otherwise. The affidavits of both government attorneys and other

members of the prosecutorial team that the government attached to its motion for reconsideration, in the absence of a finding of prosecutorial misconduct, suggest that the government's answers at the argument of the motion for new trial were inartful but not duplicitous.

A review of cases finding a violation of *Napue* shows that the falsehoods in those cases have usually been far more serious than those that occurred in this case. We have found a violation of *Napue* in cases when there was a material discrepancy between the testimony of government witnesses and defense witnesses, the government was aware that its witnesses committed perjury on the stand but such perjury was not disclosed to the jury, and the credibility of the witnesses was the key to the jury's determination of guilt or innocence. *Barham,* 595 F.2d at 242-43. We reversed because not only was the jury shielded from the fact that the witnesses had committed perjury, but it was also shielded from the fact that the witnesses had attempted to manipulate the jury's decision-making process by creating a false impression. *Id.* at 243. Even in such an apparently egregious situation, we were still loath to grant a new trial. We found that the government had provided defense counsel with a letter disclosing the plea bargains that the witnesses had entered into, but that the counsel had inexcusably over-looked the letters. While such disclosure would normally have been sufficient to prevent a *Napue* violation, the government's posing of misleading questions to the witnesses negated its disclosure, and *that* created the deprivation of due process. *Id.* at 243 n. 17.

The grant of a new trial is necessarily an extreme measure, because it is not the role of the judge to sit as a

thirteenth member of the jury. *See State v. Ladabouche,* 146 Vt. 279, 502 A.2d 852, 856 (1985) (stating that such a formulation would allow the judge to order a retrial when he disagreed with the outcome). The judge's job, in connection with an alleged *Napue* violation, is to grant a new trial when the fact-finding function of the jury has been corrupted by a material falsehood of which the government was aware. Based on the facts of this case, we cannot find that the jury was prevented from performing its essential function. Therefore, we do not find that there is a reasonable probability that the jury would have reached a different outcome even had it been fully aware of all of the alleged inconsistencies and falsehoods in Donaldson's testimony. As a result, the falsehoods were not material and no *Napue* deprivation of due process occurred.

IV

[22,23] Although we find that no violation of *Napue* occurred, we will nevertheless uphold the district court's order granting new trial if it is in the "interests of justice." FED.R.CRIM.P. 33. These "interests of justice" may be based on the trial judge's evaluation of witnesses and weighing of the evidence. *See Tibbs v. Florida,* 457 U.S. 31, 37-38, 102 S.Ct. 2211, 2215-16, 72 L.Ed.2d 652 (1982). Although grant or denial of the motion is entrusted to the sound discretion of the judge, motions for new trial are not favored, and are granted only with great caution. *United States, v. Hamilton,* 559 F.2d 1370, 1373 (5th Cir. 1977). "The remedy of a new trial is rerely used; it is warranted 'only where there would be a miscarriage of justice' or 'where the evidence preponderates heavily against the verdict.' " *United States v. Andrade,* 94 F.3d 9, 14 (1st Cir. 1996). Chief Judge Sear

principally based the grant of new trial on the finding of a violation of *Napue,* but this finding was reinforced by the delayed release of FBI 302 reports (for both Donaldson and Moore) to the defense, the "cloud" cast over the testimony of Moore by the changes in his testimony, and the prosecution's attempt to mislead the defense by changing the indictment. Without the *Napue* violation, we hold that it was an abuse of discretion to grant a new trial based on these findings.

[24-26] First, the trial court noted that the FBI 302 reports were provided to the defense within the time mandated by the Jencks Act,[12] 18 U.S.C. § 3500 *et seq.,* but stated that it could not "conclusively find that the production of the reports during trial did not adversely affect the court's ability to reach a just conclusion, particularly in light of the government's conduct in connection with the FBI 302 reports of Charles Donaldson." Order, at 54. The argument is not that the government suppressed evidence, *See Brady v. Maryland,* 373 U.S. 83, 85-89, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), but that the disclosure of the reports was so delayed that the defendants were unable to use them effectively at trial and the court's ability to reach a just result was impaired. *See United States v. Campagnuolo,* 592 F.2d 852, 861-62 (5th Cir. 1979). When evidence is disclosed at trial in time for it to be put to effective use, a new trial will not be granted "simply because it [the *Brady* evidence] was not disclosed as early as it might have and, indeed, should have

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[12] The Jencks Act requires the government to produce any statements made by a witness concerning the subject matter on which the witness has testified that are in the possession of the government after the witness has testified on direct examination in a criminal trial prosecuted by the federal government. 18 U.S.C. § 3500(b); FED.R.CRIM.P. 26.2.

been." *United States v. McKinney,* 758 F.2d 1036, 1050 (5th Cir. 1985). Moreover, even if the disclosure of *Brady* material was impermissibly delayed, such evidence must still be found to be material. *See Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995).

In this case, the government submitted the FBI 302 report of Moore to the court for an *in camera* review after cross-examination had begun, following which the court gave the report to the defense. Trial was recessed for the remainder of that day to allow the defense time to prepare. Donaldson's FBI 302 report was turned over to the court for *in camera* review prior to the beginning of his direct testimony, and the court then handed it over to the defense. During the more than one day of Donaldson's testimony, the defense was able to review the testimony. Although turning these reports over to the defense earlier would have certainly avoided the delays during trial, based on our review of the record and the absence of any affirmative finding (other than the conclusion) by Chief Judge Sear that the delayed disclosure of the reports may have impaired O'Keefe's ability to effectively cross-examine Donaldson and Moore, we cannot find that the delayed disclosure of the FBI 302 reports violated *Brady. See Lawrence v. Lensing,* 42 F.3d 255, 257 (5th Cir. 1994); *United States v. Randall,* 887 F.2d 1262, 1269 (5th Cir. 1989); *McKinney,* 758 F.2d at 1050. As we have extensively discussed above, O'Keefe's attorneys used Donaldson's FBI report to conduct a devastating cross-examination. Defense counsel were also able to bring out inconsistencies in Moore's testimony as well, although he did not perjure himself. Thus, without viewing the delayed disclosure in the light of a *Napue* violation, we find that this basis for new trial has little merit.

Next, the district court also found that the changes in the testimony of Moore, another key government witness, cast a cloud over his testimony, which, when viewed "in light of the circumstances surrounding Donaldson's testimony," supported the grant of a new trial. However, Chief Judge Sear also found that O'Keefe could not point to any specific instances of perjury by Moore, and that the changes in Moore's testimony provided ample grounds for cross-examination. No violation of *Napue* was alleged in connection with Moore's testimony, and these inconsistencies were explored before the jury on cross-examination. Further, Chief Judge Sear separately considered the inconsistencies in Moore's testimony as the basis for a new trial in another part of the order granting new trial and concluded that the claims of O'Keefe with regard to Moore's testimony lacked merit. Thus, without being viewed in the light of a *Napue* violation, this basis for new trial also has little merit.

Finally, the district court found that the prosecution's attempts to mislead defense counsel by altering the indictment, in light of Donaldson's testimony at trial, supported granting a new trial. We have already discussed the changes in the indictment, and have found that the district court abused its discretion in finding that the government attempted to mislead the defense by redrafting the indictment because the prominence of the minutes in pretrial proceedings made it impossible for the government to have misled the defense. Thus, this basis for new trial has little merit.

Viewed as a whole, each of these three findings of the court primarily relied upon the finding of a *Napue* violation because each finding was discussed "in light of" the *Napue* violation. Taking away the finding of a violation of *Napue*

we are unable to conclude that the remaining grounds for grant of new trial meet our past standards for grant of new trial or would be in the "interests of justice." Thus, we conclude that Chief Judge Sear abused his discretion in granting a new trial. Accordingly, we vacate the order granting a new trial.[13]

V

When Chief Judge Sear granted the motion for new trial, he declined to address O'Keefe's remaining arguments for new trial, which included arguments based on the government's voluntary dismissal of five counts from the indictment after the government had concluded its case, the alleged "marginal" nature of the evidence, and the cumulative effect of all the grounds asserted in all other defense motions. We accordingly remand to the district court to hear these remaining arguments for new trial.

[27,28] The government has suggested that if a remand is needed, the case should be remanded to a judge outside the Eastern District of Louisiana, relying on *United States v. Jordan*, 49 F.3d 152, 159-160 (5th Cir.1995) (remanding case involving judicial disqualification to district court outside original district). Such a remedy is discretionary, and the exception rather than the rule. *See id.* at 162 n.21 (Garza, Emilio, J., dissenting). It seeks to avoid placing a district judge's colleagues in the uncomfortable position of passing on her previous rulings. *Id.* at 160 n. 18. In *Jordan*, the judge

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[13] In light of our vacation of the order granting new trial, we decline to address arguments concerning whether the grant of new trial should include Schmitz.

abused her discretion by failing to recuse herself prior to sentencing the defendant after recusal had become appropriate under § 455(a). *Id.* at 158. Here, we have already vacated the order granting new trial, and Judge Lemmon will only review O'Keefe's remaining arguments for new trial, which does not require her to pass judgment on any of Chief Judge Sear's discretionary rulings. In addition, the law of the case doctrine and general principles of comity serve to respect and reserve the authority of Chief Judge Sear. *See, e.g., Loumar v. Smith,* 698 F.2d 759, 762 (5th Cir.1983); *Abshire v. Seacoast Prod., Inc.,* 668 F.2d 832, 837 (5th Cir. 1982). Therefore, we remand the case to Judge Lemmon.

For the foregoing reasons, the order granting new trial is VACATED, and the case is REMANDED to Judge Lemmon to hear O'Keefe's remaining arguments for new trial. The government's motion to remand this case to a court outside the Eastern District of Louisiana is DENIED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-31181

FILED
DEC 15 1997

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

MICHAEL O'KEEFE, SR: ERIC SCHMIDT:
JOHN O'BRIEN; GARY BENNETT; PAUL SCHMITZ

Defendants - Appellees

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 11/11/97, 5 Cir., F.3d)

Before WISDOM, JOLLY and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Peteition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza

United States Circuit Judge

APPENDIX C

MINUTE ENTRY
SEAR, CHIEF JUDGE
AUGUST 15, 1996

FILED
AUG 15 '96

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CRIMINAL ACTION
VERSUS	*	NO. 95-106
MICHAEL O'KEEFE, SR., ERIC SCHMIDT, GARY BENNETT, JOHN O'BRIEN, PAUL SCHMITZ	*	SECTION "C"

MEMORANDUM AND ORDER

. . . . .

C. The Perjury of Charles Donaldson

1. Standard Governing Perjury as Basis for New Trial

The defendants maintain that they are entitled to a new trial based on the government's reliance on the false testimony of Charles Donaldson in violation of *Napue v. Illinois,* 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959).To prevail under *Napue,* the defendants must show (1) that Donaldson's testimony was actually false; (2) that the testimony was material, i.e., that disclosure of the perjury would have been reasonably likely to have affected the judgment of the jury; and (3) that the prosecution knew Donaldson's testimony was false. *United States v. Blackburn,* 9 F.3d 353, 357 (5th Cir. 1993) (*citing Napue* as source of standard; *United States v. Chagra,* 735 F.2d 870, 874 (5th Cir. 1984).

2. The Perjury

The first element of the *Napue* standard is easily satisfied here because four instances of perjury by Charles Donaldson have been revealed to date. Two of the acts of perjury were revealed to date. Two of the acts of perjury were revealed during trial. First, Donaldson denied but then admitted on cross-examination[131] that in his FBI interview(s) he had falsely accused O'Keefe of participating in the alteration of a set of 1988 BCI Board meeting minutes to reflect that Donaldson had authority to bind BCI. Defense counsel's cross-exmination on this issue was based on an FBI 302 report of Donaldon's March 3, 1995 FBI interview, which was not furnished to the defendants until immediately prior to the government's direct examination of Donaldson. The relevant testimony was:

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[131] Because Donaldson was to undergo surgery in March and might not be available to return to court during presentation of the defendants' case, defense counsel were afforded significant latitude in cross-examining him.

Q: Did you ever tell anyone that Mr. O'Keefe had created those minutes of December '88 by the addition of the words "five years thereafter."

A: I don't recall. I — I know I admitted I said that I created — I put them in myself.

Q. That's not my — my question. Let me rephrase it.

. . .

Since you started cooperating with the Government, when you're supposed to be truthfully (sic), have you ever told anyone that Mr. O'Keefe created the minutes of December 1988? And by create I mean adding the five years thereafter?

A: I don't think so. I may have.

Q: You may have?

A: Yes. I can't recall. Was that a clear answer? I can't recall.

Q: You're suggesting that you may have accused him of creating documents that you created?

A: I said I can't recall.

COURT: You also said you may have.

A: Yes. But I can't remember whether I did or not.

Q: Isn't it a fact, Mr. Donaldson, that you told the agent that Mr. O'Keefe suggested that the minutes be altered?

A: No response.

Q: Didn't you tell the agents that?

A: No, I did not.

Q: Your testimony under oath is that on March 3, 1995, you did not tell Agent Susan Phillips that Mr. O'Keefe suggested that the BCI shareholders minutes be altered to make it appear that Donaldson had authority to enter into the contract; did you make that statement to the FBI?

A: At — I — I did, yes.

Q: And that was a false statement, wasn't it sir?

A: It was a false statement.

Q: And you lied to the FBI, did you not?

A: Yes, I did.[132]

Donaldson committed this act of perjury on the witness stand at trial by denying an act to which he then admitted.

Cross-examination at trial further revealed that Donaldson had committed perjury at his Rule 11 proceedings in the United States District Court for the Middle District of Louisiana on March 27, 1995. At the Rule 11 proceedings, Donaldson pled guilty to one count of mail fraud pursunt to

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[132] Testimony of Charles Donaldson on cross-examination by counsel for Michael O'Keefe, Sr., Record Doc. No. 249 at pp. 105-107.

a plea agreement with the government.[133] FBI agent Susan Phillips read into the record the factual basis for the plea based on the FBI investigation, including the statement that, "investigation . . . has further confirmed that Michael O'Keefe acted with Charles Donaldson to create the forged set of minutes submitted to [the Nineteenth Judicial District Court for the State of Louisiana]."[134] At trial, Donaldson admitted under cross-examination that although O'Keefe did not create the minutes, at the Rule 11 proceeding he testified under oath that this factual basis was true and accurate.[135]

On July 31, 1996, at oral argument on defendants' post-trial motions, the startling revelation was made by the government lawyers that Donaldson's perjury was not that which seemingly was revealed at trial four months earlier:

THE COURT: All right. But is there any question in your mind, Mr. Boitmann, that Mr. Donaldson did, in fact, commit perjury?

MR. BOITMANN: I have to answer that by answering: Yes, but not the perjury that everybody has been talking about.

THE COURT: Oh, there's some other perjury?[136]

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[133] Government Exhibit 43a.

[134] Defendants' Memorandum in Support of Motion for New Trial, Record Doc. No. 294 at pp. 109-113.

[135] Record Doc. No. 249 at pp. 5.

[136] Transcript of oral argument, Record Doc. No. 316, at pp. 3-4.

Mr. Boitman then explained that it was the government's position that Donaldson lied on the witness stand at this trial by testifying that he had ever told the FBI agent that O'Keefe had altered the BCI minutes. According to the government, Donaldson never told the agent that O'Keefe suggested that Donaldson create the false minutes. Rather, the government contends, Agent Susan Phillips erroneously reported Donaldson's statements at the interview, the error in the FBI 302 report was erroneously incorporated into the factual basis for Donaldson's plea, and Donaldson perjured himself by adopting the factual basis as the truth at the Rule 11 proceedings.[137] Accepting this explanation as true, Mr. Boitman thus admits knowledge of two acts of perjury by Donaldson, one before the Middle District at the Rule 11 proceedings and another on the witness stand at trial during cross-examination of Donaldson.

Mr. Boitmann's admission of knowledge of these latter two acts of perjury suggests the possibility that yet another act of perjury occurred at this trial but was not brought to the attention of the court and defense counsel at that time: Donaldson's denial that the government had any knowledge of his perjury prior to trial. Donaldson testified on cross-examination that:

Q: Well, did you ever tell the Prosecutors that you lied about Mr. O'Keefe concerning the minutes? Did you ever tell the Prosecutors that?

A: I don't believe so.

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[137] Transcript of oral argument, Record Doc. No. 316, at pp. 11-12.

Q: So, they're just finding out about it for the first time right now; is that what you're telling me?

A; I –

Q: The question is: Are they finding out about this false allegation for the first time right now, sir?

A: Yes, I suppose so.[138]

What the written transcript does not reveal, and what was highlighted at oral argument when defense counsel played back this portion of the tape-recorded transcript, are almost interminable pauses between the questions and responses highlighted above. I conclude that in light of the information revealed by the government at oral argument, the clear significance of Donaldson's protracted pauses in answering the straightforward questions is that he was not testifyig truthfully when he denied that the government had knowledge of his perjury prior to trial. The sheer number of perjuries calls into question whether some as-yet-unidentified additional acts of perjury occurred.

3 The Government's Knowledge

Another requirement of the *Napue* standard is that the prosecution knew the testimony was false. It was my distinct impression during sidebar conferences at trial that the government knew Donaldson's testimony at trial and at the Rule 11 proceedings was false. At oral argument on the defendants' motions, Robert Boitmann advised the court that the government became aware of the error in the fact-

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[138] Record Document No. 249 at pp. 113-114.

ual basis and the FBI 302 report prior to Donaldson's arraignment and tried to correct the factual basis two days before the arraignment, but the correction never made it into the record and the government did not learn of this until Donaldson's testimony at trial.[139] I consider this explanation incredible considering that the government also produced and delivered to defense counsel an FBI 302 report that did not contain the claimed correction and failed to question Agent Phillips at trial despite her presence in court at various times. In any event, the government learned of the perjury at trial but, as discussed hereinafter, took no measures to correct it at trial.

1. Effect of the Perjury on Fairness of Trial/ Materiality

The defendants maintain that they were deprived of a fair trial because the government failed to correct the perjurious statements of Donaldson when they surfaced. Due process is violated even when the prosecutor, though not soliciting false evidence from a government witness, allows it to go uncorrected. *Napue* v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959); *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *United States v. Barham,* 595 F.2d 231, 241-242 (5th Cir. 1979). The duty to correct false testimony of a govenment witness is on the prosecutor, and that duty arises as soon as the false evidence surfaces. *Napue*, 79 S.Ct. at 1177.

The two instances of perjury revealed at trial, though not "corrected" by the government, were explored before

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139 Transcript of oral argument, excerpt of government argument, at p.4.

the jury and I believed at that time that the jury was able to make the credibility determination called for under the circumstances. The fairness of the trial was called into question, however, by the revelations at oral argument. Although defense counsel elicited admissions from Donaldson on cross-examination that were damaging to his credibility, it has become apparent after trial that the true nature and scope of Donaldson's perjury was never disclosed or corrected by the government, or revealed on cross-examination by the defendants.

Despite numerous opportunities both before and after trial to correct the error and/or to prevent perjurious testimony, the government did not address the matter until after trial. For example, on February 9, 1996, following a status conference in chambers at which defense counsel accused the government of misleading them by changing the indictment to delete the overt act concerning the affidavit, I urged the government to be as forthcoming as possible with the defendants prior to trial. The government thereafter sent defense counsel a letter advising, *inter alia*, that

> 1, FIVE YEARS LANGUAGE
>
> a. Donaldson added the language of "five years thereafter" to the BCI resolution. We do not believe that O'Keefe directed him to add the language. However, we do believe that O'Keefe had input into the drafting of the Kisler rebuttal affidavit signed by Donaldson which incorporates the reference to the five years thereafter. However, we note that we have deleted from the indictment the statement about the

> use of the resolution by O'Keefe in the civil proceedings.[140]

The government did not explain why they "[did] not believe that O'Keefe directed [Donaldson] to add the language ["five years thereafter" to the minutes]" — i.e. that, as they maintain now, Donaldson never accused O'Keefe of doing so but that an error was made by the agent who reported on Donaldson's statement.

Further, at trial the error referred to by the government appeared in the express language of an FBI 302 report furnished by the prosecutors to the defendants. After providing defense counsel with the erroneous report, the government watched defense counsel undertake a cross-examination that, in view of the information available to the government but unapparent to anyone else, was based on the erroneous report and thus a misunderstanding of the perjury. Despite all of this, the government at no time sought to correct the alleged error by questioning the individual they now blame for the error — Agent Susan Phillips, who was present in court at various times during trial.

The government maintains that it advised the court of the circumstances of the "new perjury" during a sidebar conference in chambers during trial:

> THE COURT: Now, let me ask you this question, Mr. Boitmann. When did you find out that he had lied?
>
> MR. BOITMANN: Your Honor, we were aware — in the context of when [he] lied under

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[140] Exhibit B to Defendants' Motion for New Trial, Record Doc. No. 294.

oath, I was not aware of — and probably should have been more aware, but I was not aware of what occurred at the plea with regard to that. As a — as respect to whether or not he claimed that Mr. O'Keefe had done the memorandum, well that particular claim —

THE COURT: What memorandum?

MR. BOITMANN: Not memorandum, excuse me, minutes.

* * *

I think the Court look at his reports of interview. I think we gave it over to the Defense. I know that in the grand jury material where we had, it was clear to me that he was saying he had prepared the minutes. He had sent both sets of minutes to Mr. O'Keefe and Mr. O'Keefe told him that the addition he made didn't make any difference. And I took that to mean that the addition he added didn't help the matter, because factually it didn't help the matter. So, in that regard —

THE COURT Let me ask you one more time. Did you ever talk to him about that particular episode where O'Keefe had altered those minutes?

MR. BOITMANN: I think Ms. Taylor talked to him about that.[141]

MS. TAYLOR: Yes, and the only indication that I'm aware of was Susan Phillips misstating what I've always understood from Mr. Donaldson. He prepared the false five years thereafter (sic) on the minutes. He gave those falsified minutes to Mr. O'Keefe who then incorporated something he knew to be false into an affidavit. Mr. O'Keefe then took that affidavit and filed it in the court. Mr. O'Keefe did not make the false minute entry. But, he knew Donaldson had made a falsification on the minute entry and had used it. That's always been my understanding of what Mr. Donaldson said Mr. O'Keefe had done.[142]

This colloquy cannot by any stretch of the imagination be viewed as explaining the circumstances that were disclosed at oral argument four months after trial.[143] The prosecutors' answers are obviously evasive.Moreover, review of the discussion that followed this colloquy reveals that far from clari-

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[141] Trial transcript at Vol. 9, pp. 150-151.

[142] Trial transcript at Vol. 9,p. 151.

[144] In any event, the colloquy occurred outside the jury's presence and was held days after Donaldson testified, had returned to his home in the Bahams, and presumably was unavailable due to previously scheduled surgery.

fying the matter, the confusion remained: after Ms. Taylor's response, defense counsel pointed out that the factual basis adopted by Donaldson under oath at the Rule 11 proceedings stated that O'Keefe had created the false minutes. I concurred, and I also observed that Donaldson admitted that he had lied to the prosecuting attorneys. Mr. Boitmann nodded affirmatively but Ms. Taylor shook her head negatively. I pointed out my frustration at the prosecutors' inability to agree, at which time Mr. Boitmann explained that he was merely agreeing that that was Donaldson's testimony; Ms. Taylor did not explain why she was shaking her head negatively. The prosecutors made no further attempts to clarify the matter, in spite of the obvious confusion and misunderstanding and the availability of Agent Phillips to explain the alleged error.

The defendants suggest that the government's conduct went beyond a failure to correct the perjury, but was even more egregious in that the prosecutors sought to benefit from it in several ways at trial. For example, in their redirect examination of Donaldson the government sought to capitalize on the issues raised by defense counsel in cross-examination by eliciting the damaging testimony that although O'Keefe did not draft the false minutes, he knew they were false and incorporated them into an affidavit to be presented to a Louisiana state court. This is the very issue that the government deleted from the indictment and has argued is immaterial to a finding of guilt. Further, in closing argument the government sought to bolster Donaldson's credibility by suggesting that in spite of his perjury (the nature and scope of which at the time was still not understood by defense counsel, the court, and undoubtedly the jury) no perjury occurred in the trial before my court and, in any event, the rest of

Donaldson's testimony was credible and corroborted.[144] In light of the facts disclosed at oral argument four months after trial, I agree that the government's conduct on redirect examination and in closing argument was improper. Also apparent is that the prosecutors sought to preserve their own image by failing to correct Donaldson's testimony, elicited on cross-examination, that the government did not learn of his perjury until during trial. Regardless of the circumstances urged by the government, this testimony conveyed a false impression that the government was in no manner apprised of Donaldson's misconduct.

Finally, I note that although prior to oral argument I suspected but was not persuaded that the change in the indictment concerning the false affidavit was improperly motivated, the more recent revelations by the prosecuting attorneys confirm what I suspected: the change in the indictment was part of an effort to mislead defense counsel in their preparataion for trial, to cover up Donaldson's conduct and thereby salvage his credibility, and to protect the credibility of the prosecution itself.[145]

The government maintains that the defendants are not entitled to a new trial because even assuming the perjury was not revealed until after trial, it was not material to the jury's determination. A new trial is required when there is any reasonable likelihood that disclosure of the truth would

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[144] Trial transcript at Vol 12, p. 20.

[145] My ruling on the defendants' motion to dismiss the indictment remains unaffected by this finding, insofar as there was no perjury before the grand jury and the indictment itself was not tainted by the government's decision to remove the overt act.

have affected the judgment of the jury. *Kyles v. Whitley*, ___ U.S. ___, 115 S.Ct. 1555, 1565, 131 L.Ed. 2d 490 (1995);[146] *Kopycinski v. Scott*, 64 F.3d 223, 225 (5th Cir. 1995); *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir.) *cert. denied*, 115 S.Ct. 102 (1993). The showing is satisfied if the undisclosed evidence is such that it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Kyles*, 115 S.Ct. at 1566. The Supreme Court has noted that this strict standard is especially appropriate in false testimony cases because such cases involve not only "prosecutorial misconduct" but also "a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104, 96 S.Ct at 2397).

The government maintains that the undisclosed circumstances are not material because other evidence corroborated Donaldson's unperjured testimony and the jury could have found the defendants guilty of the charged offenses based on other record evidence.

Any argument that Donaldson's testimony was not material is undermined by the clear impression the government lawyers gave prior to trial that Donaldson was an indispensable witness. Their need for his trial testimony was the primary basis on which they opposed the defendants' motion to continue the March 4, 1996 trial.[147] Donaldson and Johnny Moore were among the first witnesses to testify at trial, and it took a number of days to hear their testimony.

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[146] *See also United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1975); *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1975).

[147] Record Doc. No. 203.

In any event, the government's focus is on the *substantive* relevance of the undisclosed evidence and its overall bearing on the defendants' guilt, but "it is immaterial whether the false testimony directly concerns an essential element of the Government's proof or whether it bears only upon the credibility of the witness." *United States v. Barham*, 595 F.2d 231, 241 (5th Cir. 1979). As the Supreme Court has noted, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue*, 360 U.S. at 269, 79 S.Ct. at 1177. Elaborating further, the Supreme Court quoted from a lower court decision:

> 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's quilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'

Id. at 269-270, 79 S.Ct. at 1177 (citations omitted).

The defendants point to several specific ways they would have proceeded differently in attacking Donaldson's and Moore's credibility had the government disclosed the

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147 Record Doc. No. 203.

error in the FBI 302 report and the fact that Donaldson had pled guilty to an erroneous factual basis.[148] For instance, their cross-examination would have been simply to show that Donaldson was willing to testify under oath to any script he believed the government wanted him to adopt, regardless of its truth' it would not have been necessary to question him specifically about the affidavit.[149] Further, disclosure of the error in the factual basis adopted by Donaldson would have justified inquiry both before and during trial into the process by which the factual bases were drafted and what role the government witnesses played in this. Finally, defense counsel state that they would have explored at greater length the plea agreement process and the motivation Donaldson and Moore had to mold their testimony to curry favor with the government.[150]

The defendants also point to the government's lack of knowledge of the many changes in Johnny Moore's testimony as a factor that is cumulative to Donaldson's perjury. While the defendants do not articulate any specific perjury by Johnny Moore, they accurately point out that Moore continously changed his testimony on many matters. As I observed in a sidebar conference during trial, I witnessed utter surprise on the faces of the government lawyers several times during Moore's testimony, and the government lawyers

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[148] August 2, 1996 letter from defense counsel.

[149] The significance of this is that the damaging redirect examination about the affidavit likely would not have been allowed.

[150] The government's response to the defendants' letter does not alter my impression. It relies on revisionist history that is clearly refuted by the events as they appear in the record. See Government letter dated August 7, 1996.

acknowledged their surprise at the changes in Moore's testimony:

> THE COURT: . . . if you watch the expressions — I have a vantage point in which I can see —
>
> MR. TAYLOR: I'm dying.
>
> THE COURT: — the expressions of the FBI agent, Dee Taylor and —
>
> MS. TAYLOR: I try to hide it.
>
> THE COURT: Bob Boitmann. I can't see Tim at all, but, you know, I see the grimaces. And I grimace for them, really.[151]

Later in the same sidebar conference, the government lawyers questioned the usefulness of the FBI 302 reports of Moore for purposes of impeachment, suggesting that *due to the number of changes in Moore's testimony,* he had been thoroughly impeached already:

> MS. TAYLOR: — I mean, you know, how many more times do you want to show he's chaned his story? I mean, you know, he can only, like, so many times.[152]

I commented several times that the many changes in

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[151] Trial transcript at Vol. 4, pp. 28, 29.

[152] Trial transcript at Vol. 4, p. 50.

Moore's testimony were fodder for cross-examination. However, in view of the circumstances surrounding Donaldson's testimony, I now find that the cloud cast over Moore's testimony, and the government's reaction to it, lends additional support for the grant of a new trial.

Based on the foregoing, I find that the defendants have made a sufficient showing that the undisclosed evidence concerning Charles Donaldson, when considered in conjunction with the consistently contradictory testimony of the other key government witness, Johnny Moore, reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict, and I reject the government's argument that the presence of other evidence against the defendants necessarily turned a tainted trial into a fair one. Although based on the extensive briefs filed by all the parties I was prepared to deny the defendants' motion for a new trial, following oral argument I am now persuaded that a new trial is the proper remedy under the circumstances.[153]

. . .

VII. Conclusion

The defendants have been successful in obtaining a new trial. As I said before in addressing the perjury of Charles Donadson, prior to oral argument I was not inclined to grant this remedy. I believed as that the jury, which performed its

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[153] Based on this finding, I decline to address the defendants' remaining miscelaneous arguments for a new trial, including (1) the government's voluntary dismissal of five counts from the indictment following the government's case; (2) the alleged "marginal" nature of the evidence; and (3) the cumulative effect of all the grounds asserted in all other defense motion.

duty so diligently, had been apprised of all relevant information required to reach a verdict. At oral argument it became apparent that such was not the case.

Because of the sensitive nature of the court's inquiry concerning conduct of government counsel, the court's personal participation and questioning of counsel in connection with that inquiry, and the findings of the court resulting from that inquiry, the court feels compelled to recuse itself from further handling of this matter in accordance with 28 U.S.C. § 455.

Accordingly,

IT IS ORDERED that the defendants' motion for new trial IS GRANTED.

/s/ Morey L. Sear
MOREY L. SEAR
CHIEF JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

Tel. 504-589-6514
600 CAMP STREET
New Orleans, LA 70139

December 23, 1997

Ms Loretta Whyte, Clerk
Eastern District of Louisiana, New Orleans
United States District Court
500 Camp Street
Room C-151
New Orleans, LA 70130

No. 96-31181 USA v. O'Keefe, Et Al
USDC No. 95-CR-106-G

Enclosed, for the district court only, is a certified copy of the judgment issued as the mandate.

Enclosed, for the district court only, is a copy of the court's opinion.

Record/original papers/exhibits to be returned.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Amanda Maria Sutton, D/C
Amanda Maria Sutton,
DeputyClerk

/1mm

CC: (letter only)
Honorable Morey L. Sear
Mr. James A McPherson
Mr. Bruce Charles Ashley
Mr. John R. Martzell
Mr Richard T Simmons Jr
Mr Stephen A Higginson

MDT-1

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION NO. 95-106
VERSUS	SECTION "G" (5)
MICHAEL O'KEEFE, SR. ET AL	

JOINT MOTION FOR AN EVIDENTIARY HEARING AND IN-CAMERA REVIEW

NOW INTO COURT, through undersigned counsel, come defendants, Michael H. O'Keefe, Sr., Eric Schmidt, Gary R. Bennett, John P. O'Brien and Paul Schmitz, who move this Honorable Court to the extent relief is not granted based upon the Rule 29, 33 and 34 pleadings, in the alternative, for an evidentiary hearing. It is the position of the defense that based upon all of these pleadings, the Court could grant a new trial, arrest the judgment of conviction, or judgments of acquittal without further evidentiary hearings. On the other hand, the converse is not true. The Court cannot deny a motion for a new trial without an appropriate evidentiary hearing. Additionally, in regards to defendants' Motion to Dismiss the Indictment, an in-camera inspection of the Grand

Jury proceedings is required.

For reasons set forth to the attached memorandum in support of the motion for an evidentiary hearing, the defense requests such a hearing and the obtaining of various disclosures prior to that hearing, including, but not limited to the minutes of the Grand Jury, all rough notes of all agents with regard to their interviews of Donaldson and Moore, any reports from Bahamian authorities on the subject matter of the forged documents on Donaldson's authorization to act for BCI, along with any notes of the prosecution's interviews with Donaldson and Moore, and an in-camera review of all 302's of witnesses who may have inconsistent statements or testimony with Moore or Donaldson, including, but not limited to, Jim Brown, Mike Mabry, L.D. Barringer, Terry North, Brian Moree, (and any other witnesses interviewed in the Bahamas), etc.

WHEREFORE, the defendants pray that the Court order an evidentiary hearing and in-camera inspection in the form and substance of the attached proposed Order.

Respectfully Submitted,

HAILEY, McNAMARA, HALL, LARMANN
& PAPALE, L.L.P.

BY:/s/Richard T. Simmons,Jr

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION NO. 95-106
VERSUS	SECTION "G" (5)
MICHAEL O'KEEFE, SR. ET AL	

MEMORANDUM IN SUPPORT OF MOTION FOR AN EVIDENTIARY HEARING AND IN-CAMERA REVIEW

MAY IT PLEASE THE COURT:

The defendants respectfully submit that an evidentiary hearing is necessary before the Court denies any motion for a new trial. At such an evidentiary hearing, it will be necessary to obtain testimony from Johnny Moore, Charles Donaldson, the prosecutors, Agents Susan Phillips, Martha Fitzpatrick, Clyde McCoy, and Investigator Scott Bailey. In preparation for such an evidentiary hearing, the defense moves for disclosure of all the rough notes of the agents with regard to their interviews of Donaldson and Moore, along with any notes by the prosecution of these interviews of Donaldson and Moore.

Because of the Brady/Giglio violations of the prosecu-

tion, the defense also asks for an inspection of all additional reports of interviews of any individuals that have been interviewed, along with the Grand Jury of any other individuals presented to the Grand Jury but who were not called at the trial of this matter. Specifically, the defendants seek inspection of interviews or testimoney of the following individuals:

(1) Commissioner of Insurance Jim Brown in order to determine if he was approached by Michael O'Keefe concerning Johnny Moore's job;

(2) Attorneys for BCI Brian Moree and Terry North concerning their interviews of Charles Donaldson and the history of the draft of the 1988 BCI minutes, along with any other interview of witnesses in the Bahamas;

(3) Heritage Management principals Mike Mabry and L.D. Barringer concerning the lack of corruption in the negotiation process of the contract of reinsurance and their approval of the distributions from the O'Keefe Trust. Additionally, the defense moves for an in-camera inspection of all of the minutes of the Grand Jury presentation for the Second Superseding Indictment for the purpose of determining whether there were appropriate disclosures to the Grand Jury of the credibility problems of Charles Donaldson (ie., the circumstances surrounding the deletion of the overt act with regard to the false affidavit).

(4) The results of any investigation by Bahamian authorities into the subject matter of the forged documents on Donaldson's authority to act for BCI.

Respectfully Submitted,

HAILEY, McNAMARA, HALL, LARMANN
& PAPALE, L.L.P.

BY:/s/Richard T. Simmons,Jr

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I DO HEREBY CERTIFY THAT I HAVE ON THIS 1st DAY OF MAY 1996, SERVED A COPY OF THE FOREGOING PLEADING ON COUNSEL FOR ALL PARTIES TO THIS PROCEEDING BY MAILING THE SAME BY UNITED STATES MAIL, PROPERLY ADDRESSED, FIRST CLASS POSTAGE PREPAID.

/s/ W. G. Burns

APPENDIX F

MINUTE ENTRY
SEAR, CHIEF JUDGE
OCTOBER 2, 1996

FILED
OCT 2 '96

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CIVIL ACTION
VERSUS	*	NO. 95-106
MICHAEL O'KEEFE, SR., ET AL	*	SECTION "S"

ORDER

On reflection following the status conference held on October 1, 1996, the parties need not submit additional briefing on the issues raised in the government's motions.

IT IS ORDERED that the government's motion for reconsideration IS DENIED.

IT IS ORDERED that all other motions filed by the government are rendered moot.

/s/ Morey L. Sear

MOREY L. SEAR
Chief Judge

DATE OF ENTRY OCT 3 1996

Ed Gonzalez — 3/3/95
Rick Lawney
Bob Boitnott
Dan Taylor
Steve Rosen
C. Donaldson

SR - preliminary - to solicit cooperation of C.D. thinks can provide valuable info - 110% interested in cooperating. SR discussed but not concerned that info will be used against CD in plea agreement falls thru. EG will only quote if lie/perjures to contrary @ a probe/dep. SR don't usually do that way. But cooperation w/ Govt good for CD's well being. @ SR doesn't foresee any problems - but reserves right to not let/ask certain questions. EG - don't want burden in future to have to show that evidence derived from another source. EG - will use video as this declined but you will pull back if want

CD → MD, ES, JO, GB - known BCI in dash about negotiations. 1st contact - GB - wrote letter saying understood BCI were in fact a dormant CO - da known - GB made offers in letter. States they wanted to use BCI as a recruitment for PN who had been taken into log by LDI. CD send interested + looked @ CO doesn't think had permission but gave OK + was wrong. When they tried to log rein = knew didn't have permission

ATTACHMENT

BEST AVAILABLE COPY

CD understood to take out business & put into another CB. Cn all conv w/ rep of BCI — they never mentioned that they were doing business with BCT - had several meetings. The longer affidavit was prepared by MO's office - faxed to CD for signature - told had to have perry in a matter minutes — that's when altered minutes. SR - O'Keefe instrumental in getting CD to alter minutes. In 1993 altered 1998 minutes SR- MO told CD that 1993 we don't worry about BCT - we will be out of the company in 2-3 mo's & no one will know the difference. MO send had to convey behind - I will prepare affidavit MO never thought that when sent fax - telephone # & date come up on top. CD- no # sent to BCI - # sent to his CD with instructions to send back - has copies of bank records. CD sent written instructions - MO send not to do anything without his instructions that's why asked for in writing. When PW came to capture rigs - they took all written correspondence CD - was unable to do any copying from store files. Branchport & Hughes packed up files - only has bank statements & funds transmitted.

CD - will give access to phone records
Griffiths - CD didn't know anything about
arrangement w/ S.Drake - told after the
fact. asked why took out with S.D. said
had to have reimbursement on top of the
reimbursement they had. no conversations
with anyone @ S.D. re: this contract.
Found out about S.D. after sent documents
to signal attorney Early 1992 found out about
S. Drake. Found out contract was cancelled.
EG → Appendix B- unsigned
Oct 18 agreement between BCI & Sphere Drake-
doesn't recall agreement. CD- no knowledge
MG. OR conv with certainty in B.R.
OR having spoken to JG on 10/18.
BB → 10/30/91 letter talking confirming binding S.D.
@ 14 Sphere Drake - Oct 18 is
SR possible doc altered after CD's signed.
SR → CD in new Orleans on 10/16 + 10/17. SR - CD
may have had conv w/ JG but doesn't invite
to party. CD - MD indicated in 1 of 2
meetings had write - in conv with atty
counsel to LOI - MD said don't worry about
the LOI - we are able to handle the dept -
no names mentioned. CD has heard of
JM. JD of BB long after sum agreed JM was Cty Ex + was
in trouble with the law.
Michael Johnston - Special Risk
never heard of. No dealings with
anyone in Kentucky.

150K offered to by Bennett.
CO - When paperwork came out - not aware of gravity of situation - MO would call + say don't worry it will go away - said something about doctor using him - withdraw testimony - CO knew realize reason they wanted CO. - 1993 MO said if they were witness of coup - would not need perm - because they would give it to him. MO wanted to try BCT to dictate outcome issue.
CO under impression $ sent back to U.S. in Trust fund declared by CO. Thought $ going back to pay outstanding claims. Do by TAS Veterans matters do. Thought a transaction were deduct fees + cost $ back.
Very little knowledge of PMIA.
CO as of Dec 20, 1991 signature on PMIA master policy - no signature on. CO doesn't recall signing. LEME standard agreement to get minimum of fees - whether or does much work - have to have underwriting mgr. - agreed to pay CO min fees required to be underwriter for LEME. Paperwork kept by Graham Thompson. Bill told CO that LEME was to replace BCT. CO had very little to do with LEME. affidavit sent back to MO - sent doc's Treasury Seal of Ministry of Finance - required under law.

C.D's had additional phrase - Ministry of Finance
work copy to attached to appendix - certified
C.D's copy.